Superintendent of Lands and Surveys Kuching v Jamilah bt Abdul Hamid & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–157/10 OF 2012
RHODZARIAH BUJANG J
26 FEBRUARY 2013

Civil Procedure — Originating summons — Reference on questions of law — Arbitration on native customary rights over land — Whether Proclamation could be made as evidence and/or admission of native customary rights over land in dispute — Whether arbitrator correct in decision — Whether Proclamation recognised native customary rights without taking into consideration terms and/or conditions specified in Second Schedule of Proclamation — Arbitration Act 2005 s 42 — Sarawak Land Code (Cap 81) s 5(4)

The defendants ('the claimants') were dissatisfied with the decision of the Ministry for Planning and Resources Management in issuing a directive extinguishing all native customary rights over land. The claims were referred for arbitration pursuant to s 5(4) of the Sarawak Land Code ('SLC') and the appointed arbitrator ruled in favour of the claimants. Dissatisfied, the Superintendent of Lands and Surveys ('the Superintendent') filed an originating summons under s 42 of the Arbitration Act 2005 and raised the issues of whether the learned arbitrator erred in applying a wrong principle of law; whether the Proclamation of the Constitution of Pasir-Jangkar Protected Forest ('the Proclamation') could be made as evidence and/or an admission of native customary rights of the claimants over the land in dispute; and whether the learned arbitrator was correct in holding that the Proclamation recognised native customary rights of the defendants without taking into consideration the terms and/or conditions specified in the Second Schedule of the Proclamation.

Held, dismissing the application with costs of RM3,000:

(1) The learned arbitrator did not commit any error of law when he considered that the customs had given rise to a right to use the land; hence part and parcel of native customary rights. Although a custom must have the force of law in order to be recognised as one but the court disagreed that since foraging in the jungles for livelihood was not listed, it was not native customary rights and therefore could not be part of the law of the land. Section 5(1) and (2) of the SLC only provided for the creation of native customary rights from the cut-off date of 1 January 1958 by the five means specified and not before it. The word 'may' in

sub-s (2) used before specifying the five methods of acquisition of native customary rights, meant that these five methods were not the by all and end all for the creation of native customary rights, thus leaving the possibility of other ways in which it might be created. The sections did not provide for what activities should be considered as establishing native customary rights before that cut-off date (see paras 6 & 18).

(2) In the arbitrator's judgment, he had used the Proclamation to establish the proximity of the places named to the subject lands in this case and to show that the persons named were connected. The rights of those named in the Proclamation were only to extract rubber and continue with the cultivation of the land. Again, the learned arbitrator did not commit any error of law as he had utilised the evidence on the Proclamation only to establish the linkages (see paras 17–18).

[Bahasa Malaysia summary

Defendan-defendan ('penuntut-penuntut') tidak berpuas hati dengan keputusan Menteri Perancangan dan Pengurusan Sumber dalam mengeluarkan arahan membatalkan kesemua hak-hak adat anak watan ke atas tanah. Tuntutan tersebut dirujukkan untuk timbang tara berikutan s 5(4) Kanun Tanah Sarawak ('KTS') dan penimbang tara yang dilantik memutuskan memihak penuntut-penuntut. Tidak berpuashati, Penguasa Tanah dan Ukur ('Penguasa') memfailkan saman pemula di bawah s 42 Akta Timbang Tara 2005 dan membangkitkan isu-isu sama ada penimbang tara tersilap dalam menggunapakai prinsip undang-undang; sama ada Pengisytiharan Perlembagaan Hutan Perlindungan Pasir-Jangkar ('Pengisytiharan') boleh dijadikan keterangan dan/atau pengakuan hak-hak adat anak watan penuntut-penuntut ke atas tanah yang dipertikaikan; dan sama ada penimbang tara yang bijaksana betul dalam memutuskan bahawa Pengisytiharan tersebut mengakui hak-hak adat anak watan defendan-defendan tanpa mengambil kira terma-terma dan/atau syarat-syarat yang ditetapkan di dalam Jadual Kedua Pengisytiharan.

Diputuskan, menolak permohonan dengan kos sebanyak RM3,000:

(1) Penimbang tara yang bijaksana tidak melakukan apa-apa kesalahan undang-undang apabila beliau mempertimbangkan bahawa adat telah membangkitkan hak untuk mengguna tanah; maka adalah perkara yang mesti hak-hak adat anak watan. Walaupun adat mesti mempunyai kekuatan undang-undang supaya diakui sebagai satu hak tetapi mahkamah tidak bersetuju memandangkan mencari makanan di hutan untuk mata pencarian tidak disenaraikan, ia bukan hak-hak adat anak watan dan oleh itu tidak boleh menjadi sebahagian undang-undang tanah tersebut. Seksyen 5(1) dan (2) KTS hanya memperuntukkan pembentukan hak-hak adat anak watan daripada tarikh pemotongan 1 Januari 1958 dengan lima cara yang ditetapkan dan bukan sebelumnya.

Perkataan 'may' dalam sub-s (2) yang digunakan sebelum menetapkan lima cara pemerolehan hak-hak adat anak watan, bermaksud bahawa kelima-lima cara ini bukan elemen penting untuk pembentukan hak-hak adat anak watan, oleh itu membiarkan kemungkinan cara lain yang mana ia mungkin boleh dibentuk. Seksyen-seksyen tersebut tidak memperuntukkan apakah aktiviti yang patut dipertimbangkan untuk membuktikan hak-hak adat anak watan sebelum tarikh pemotongan (lihat perenggan 6 & 18).

(2) Dalam penghakiman penimbang tara, beliau telah menggunakan Pengisytiharan untuk membuktikan dekatnya tempat-tempat yang dinamakan sebagai tanah-tanah dalam kes ini untuk menunjukkan bahawa orang-orang yang dinamakan adalah berkait. Hak-hak orang-orang yang dinamakan di dalam Pengisytiharan hanya untuk menoreh getah dan meneruskan dengan mengusahakan tanah tersebut. Penimbang tara juga tidak melakukan apa-apa kesalahan undang-undang kerana beliau telah menggunakan keterangan atas Pengisytiharan hanya untuk membuktikan hubungan (lihat perenggan 17–18).]

Cases referred to

Balare Jabu & Ors v Merawa Sdn Bhd & Ors [2011] 4 CLJ 751, CA (refd)

Maimumah Deraman v Majlis Perbandaran Kemaman [2010] MLJU 1711; [2011] 9 CLJ 689, HC (refd)

Muli ak Baya & Ors v Everbright Enterprise & 2 Ors (Sibu High Court Civil Suit No 21–6 of 2009) (refd)

Nor ak Nyawai & Ors v Borneo Pulp Plantation & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC

Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

Usang ak Labit & Ors v Rosebay Enterprise Sdn Bhd & 2 Ors (Sibu High Court Civil Suit No 21–1 of 2010) (refd)

Legislation referred to

Arbitration Act 2005 s 42
Federal Constitution art 160(2)
Land Classification Ordinance 1948
Sarawak Land Code (Cap 81) ss 5(1), (2), (4), 8(2)

Mc Willyn Jiok (State Legal Officer, State Attorney General's Chambers) for the plaintiff.

Simon Sia (Chua Kuan Ching with him) (Baru Bian Advocates & Solicitors) for the defendants.

Rhodzariah Bujang J:

[1] At the instance of the Superintendent of Lands and Surveys, Kuching the claims of 28 persons for native customary rights over land at Jalan Biawak Lundu, particularly that located at Kampung Sedaing and Kampung Kerangga, were referred for arbitration under s 5(4) of the Sarawak Land Code. These 28 persons were dissatisfied with the decision of the Ministry for Planning and Resources Management in issuing a directive on 8 April 2009 extinguishing all native customary rights over the said land. The appointed arbitrator ruled in favour of the claimants and the superintendent of lands and surveys being dissatisfied with it has now filed an originating summons under s 42 of the Arbitration Act 2005 for the following questions of law to be determined:

(a) whether the learned arbitrator erred in applying a wrong principle of law as enunciated in the cases of *Usang ak Labit & Ors v Rosebay Enterprise Sdn Bhd & 2 Ors* (Sibu High Court Civil Suit No 21–1 of 2010), *Muli ak Baya & Ors v Everbright Enterprise & 2 Ors* (Sibu High Court Civil Suit No 21–6 of 2009) as well as *Nor ak Nyawai & Ors v Borneo Pulp Plantation & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769?;

(b) whether the proclamation of the Constitution of Pasir-Jangkar Protected Forest vide *Gazette* Notification No 1356 published on 16 October 1952 could be made as evidence and/or an admission of native customary rights of the defendants over the land in dispute;

(c) whether the learned arbitrator was correct in holding that proclamation of the Constitution of Pasir-Jangkar Protected Forest vide *Gazette* Notification No 1356 published on 16 October 1952 recognised native customary rights of the defendants without taking into consideration the terms and/or conditions specified in the Second Schedule of the said proclamation;

(d) in the event the answer to question (i)(b) and (c) are in the affirmative, alternatively, whether native customary rights can be created or acquired after the date of the proclamation of the Constitution of Pasir-Jangkar Protected Forest vide *Gazette* Notification No 1356 published on 16 October 1952; and

(e) whether the learned arbitrator has misconducted himself and/or the proceedings by deciding evidence which were unavailable, in particular, by deciding that the defendants had acquired native customary rights over the land in dispute without the evidence of the other defendants who were claiming individual native customary rights over the land in dispute.

[2] Mc Willyn for the plaintiff, in his written submission has helpfully point me to the right direction in so far as my powers under s 42 goes by citing the decision of Mohamad Ariff Yusof J (as His Lordship then was) in *Maimumah Deraman v Majlis Perbandaran Kemaman* [2010] MLJU 1711; [2011] 9 CLJ 689 where His Lordship emphasised that the questions of law must arise out of the award and not out of the arbitration proceedings. The court must be satisfied, said His Lordship, that an error of law on the face of the award has occurred which warrants the intervention of the High Court. His Lordship went on to state as follows, which quotation is a good guide on how I should approach the application, which in all honesty, is my first.

Application Of The Error of Law Principles

[24] On the agreed basis that the principles on 'error of law on the face of the award' should continue to apply under s 42, the main issue then revolved around the question whether the challenge was mounted on findings of fact on the evidence, or a question of law which was in error in the accepted sense that 'the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance' (*Halsbury's Laws of England*, (4th Ed), p 334). *The resolution of this action had also to proceed on the basis that the law supported a limited jurisdiction on the part of the High Court to intervene, but lack of appraisal of the law and the evidence was not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal. There had to be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence:Sami Mousawi Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 CLJ 186 (Court of Appeal) See also *Sharikat Pemborong Pertanian dan Perumahan v Federal Land Development Authority* [1969] 1 LNS 172 and *GKN v Matro* [1976] Lloyd's Law Reports 555, vol 2: *'The weight of evidence and inferences from it are essentially matters for the arbitrator'. Further, I was obviously mindful of the first principle that this limited jurisdiction should be exercised only in 'exceptional circumstances' and should be confined to arbitral errors and not appellate errors,* in the sense that the court should not concern itself with the mere merits or correctness of the arbitrator's decision' (Emphasis added.)

[3] In other words and in simpler terms, it means that I should refrain from acting as an appellate court when considering the questions posed for my determination.

THE FIRST QUESTION

[4] The complaint here is that the learned arbitrator had wrongly decided based on the cases stated in the question framed, that the custom of 'tonyoh or kompokng' has the force of and is part of customary law. The words in quotation marks refer to the custom of the natives of Sarawak to forage for fish and hunt and collect resources from uncleared jungles for their everyday living. It is called 'pemakai menoa' in Iban and Mr Mc Willyn has submitted to me a

long and detailed submission backed by statutes and decided cases why 'pemakai menoa' cannot be part of customary law. He said these authorities show and therefore the arbitrator must distinguish and appreciate that not all customary practices of the natives can be accepted as customary law.

[5] He started his discourse with the definition of law in art 160(2) of the Federal Constitution which provides that other than written law and common law, 'any custom or usage having the force of law in the Federation or any part thereof is also law. He further referred me to s 5(1)–(2) of the Land Code which provides as follows:

> 5(1) *As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2)*, if a permit is obtained under section 10, upon Interior Area Land. Save as foresaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.
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> (2) The methods by which native customary rights may be acquired are:
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> (a) the felling of virgin jungle and the occupation of the land thereby cleared.
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> (b) the planting of land with fruit trees.
>
> (c) the occupation or cultivation of land.
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> (d) the use of land for a burial ground or shrine.
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> (e) the use of land of any class for rights or way or
>
> (f) any other lawful method.
>
> Provided that:
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> (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by license from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him, and
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> (ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958. (Emphasis added.)

[6] Whilst I have no arguments that a custom must have the force of law in order to be recognised as one but with respect I disagree with his submission that since foraging in the jungles for livelihood is not listed in para (a)–(e) above, it is not native customary rights and therefore cannot be part of the law

of the land. This is because s 5(1)–(2) only provide for the creation of native customary rights from the cut-off date of 1 January 1958 by the five means specified therein, not before it. It must be stressed that the said sub-s (2) uses the word 'may' before specifying the five methods of acquisition of native customary rights, meaning therefore these five methods are not the by all and end all for the creation of native customary rights, thus leaving the possibility of other ways in which it may be created. The other point to note is the sections do not provide for what activities should be considered as establishing native customary rights before that cut-off date. In my consideration of this issue, I also find support from and is guided by the decision of the Court of Appeal in *Balare Jabu & Ors v Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751, where it held at p 756 that there are two broad types of native customary rights. The first is where it is statutorily acquired and granted under the provisions of the land legislation and the second is historical which is recognised and existed before the coming into being of the land legislation, the federal and state constitutions. This statement backs up my view that what is described in the Land Code cannot be the only ways in which native customary rights can be created.

[7] Mr Mc Willyn has also cited the decision of the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the natives claim for native customary rights should not be extended to areas where the natives 'used to roam to forage for their livelihood in accordance with their tradition' because this would mean 'vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food'.

[8] I digress awhile to say that out of the 28 claimants in this case, four are Malays. The rest are Bidayuh Selako and the testimony of its leader, one *Ketua Kaum* Baker ak Pijar and also a claimant in this case explained that 'tonyoh or kompokng' includes an area of forest whether wholly or partially surrounded by 'jaramik' or customary rights land which were purposely reserved by an individual or community through generations and left uncleared, unfarmed or uncultivated as a source of resources for domestic needs of the community. 'Tonyoh' is a smaller area of forest whereas the bigger area is normally referred to as 'Kompokng'.

[9] Under the Land Classification Ordinance 1948, land in Sarawak are classified under five categories, which are, mixed zone land, native area land, native customary land, reserved land and interior area land.

[10] For interior area land it provides in s 8(2) thereof that there shall be no documentary titles issued in respect of it and it should not be occupied except

for the purpose of exercising native customary rights over it. It further states that natives who are in lawful occupation of Interior Area Land are licensees of Crown Land and hold any rights which they posses in respect of such land at the pleasure of the government.

[11] Mr Simon Siah for the claimants submitted that his clients 'tonyoh or kompokng' comes within that definition of Interior Area land, a proposition which I am persuaded to agree when I cause a critical examination of the definition section as it reinforces a view I hold — that rights conferred to a native over his use of the land is not and cannot be equated with the exact same rights conferred to a registered title holder under the Land Code. That definition recognises the distinction I mentioned because the obvious owner of the land is the state itself but the natives are given the rights to use it. That usage is dictated by customs and this has been mentioned by Ian Chin J in *Nor Nyawai's* case [2001] 2 CLJ 769 and it is not just confined to the clearing and cultivation of virgin jungle but extends to 'pemakai menoa' and 'pulau' where primary forest are left in their pristine state to ensure a steady supply of natural resources like rattan and timber, to enable hunting for animals to be carried out and for water catchment. A witness who was an expert on I ban customs in the *Nor Nyawai*'s case testified that the preservation of the forest was important for the survival of the Iban community. As it turns out to be, these centuries old custom has more than a grain of truth in it. The preservation of forest and water catchment area is not just important for the Ibans but mankind as well as can be seen from many scientific data supporting these and the outcry on global warming highlighted consistently in the press in recent times.

[12] I have earlier referred to the Court of Appeal's judgment overturning Ian Chin's decision on *Nor Nyawai*'s case where they said that the claim for native customary rights should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such a view is logical as otherwise it may mean that vast area of land would be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food and for sustenance. However, with the utmost of respect, I do not think that the concept of 'pemakai menoa' or ('tonyoh or kompokng') as in this case is intended to produce such *an alarming result* because as the area where the natives could establish the right to forage is limited by custom to just a half day's walk (for the Iban, as stated by Ian Chin J in *Nor Nyawai*'s case) which I have no doubt must be similar for the Bidayuhs as well. Therefore, although it is true what AJN Richards, an acknowledged expert on native customary rights law (he has written a book, *Land Law and Adat*), has said that not all native customs give rise to rights to land or is part of customary law, without any clear pronouncement to the contrary, I am not persuaded that the concept of using

land to forage for livelihood and sustenance is not part of native customary rights before the cut-off date specified in s 5(1) of the Land Code.

[13] I do not therefore agree that the learned arbitrator had committed any error of law when he considered that the custom of 'tonyoh or kompokng' has given rise to a right to use the land; hence part and parcel of native customary rights.

THE SECOND AND THIRD QUESTIONS

[14] The proclamation to establish the Pasir-Jangkar Protected Forest was *gazetted* on 16 October 1952 (see exh MC7 pp 3–4 exhibited to Mc Willyn's affidavit in support of the originating summons). The revocation of its status as one was made by way of *Gazette* Notification No 55 of 1985 which took effect on 21 November 1985. The said proclamation was specific in terms of those whose right were protected and from where. The persons so named were categorised into two groups:

(a) where their successors, administrators, executors and assigns have the right to extract rubber from the trees planted before the proclamation; and

(b) where their successors, administrators, executors and assigns may continue to exercise customary rights already acquired over *temuda* prior to the proclamation.

There is further a special condition which was that the forest was protected primarily for the use of the Land Dayak (Selako Dayak and Lara Dayak) inhabitants of the following villagers:

(a) Kampong Sungei Paur llir;

(b) Kampong Sungei Tengah;

(c) Kampong Sungei Pasir Ulu;

(d) Kampong Jangkar;

(e) Kampong Jantan;

(f) Kampong Opek; and

(g) Kampong Tanjam.

[15] Therefore, in order to claim benefit from the proclamation of that protected forest, the claimants must bring themselves within the two categories of the persons specifically named in the proclamation or that they were from the villagers named therein. Obviously, the two *kampungs* of the claimants were not mentioned in the proclamation but the learned sessions court judge had

accepted evidence from CW1 who traced his lineage to a person named in the proclamation ie Dagit ak Gunchang and that the other person named therein, Tua Kampung Malang ak Bujang was the first Tua Kampung for their village, Sedaing. Another witness, CW4 traced the Malay claimants' settlement in the said village and her lineage to one Katai bin Sudin, also named in the proclamation. He further accepted the evidence adduced before him that Kampungs Jangkar, Kampung Opek and Kampung Jantan mentioned in the proclamation were near to Kampung Sedaing, half a day walk, twenty minutes walk and more than an hour walk, respectively.

[16] When I read the judgment of the learned arbitrator he had used the proclamation to establish the proximity of the places named therein to the subject lands in this case and to show that the persons named therein were connected to two of claimants.

[17] Thus, although I agree with Mr Mc Willyn that the rights of those named in the proclamation were only to extract rubber and continue with the cultivation of the land under 'temuda' and not 'tonyoh or kompokng', it is my view as expressed above that the learned arbitrator did not commit any error of law as alleged against him in the question framed for he had utilised the evidence on the proclamation only to establish the linkages as stated above.

THE FOURTH QUESTION

[18] Mr Simon Sia submitted that the evidence from the cross-examination of the superintendent's aerial photography expert shows that areas in dark green on the photograph taken of the area in 1947 and 1962 were evidence that shifting cultivation had been practiced there although in his examination in chief and witness statement, the expert said the subject land claimed by the claimants consists of mainly primary forest. The cleared area is approximately 1788 meters square out of a total acreage of approximately 39,128 meters square. Given my earlier view that native customary rights include foraging in the jungle within the reasonable vicinity of the inhabited area by the natives, the pockets of cultivated area strengthen rather than weaken the case of the claimants. But since I have actually answered question two and three in the negative and this question is posed in the alternative an answer from me is not even necessary.

THE FIFTH QUESTION

[19] I reminded myself again that I am not hearing an appeal against the decision of the learned arbitrator. The question posed relates to his finding of

fact and his assessment of the evidence. It does not therefore come close to an error of law on the face of the record and I respectfully decline to answer the same.

[20] Having dealt with the questions posed in the above manner, I have no cause to set aside or vary the award of the arbitrator. The application is dismissed with cost agreed at RM3,000.

Application dismissed with costs of RM3,000.

Reported by Afiq Mohamad Noor